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S. Robert Chuey Name of Attorney	39,140 Registration No.
Signature of Attorney	

P&G Case 7922

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the Application of :  
**GARY (NMN) STEPHENSON** : Confirmation No. 5677  
Serial No. 09/489,310 : Group Art Unit 1614  
Filed January 21, 2000 : Examiner: S. Rose  
For **METHODS OF USING A BEVERAGE COMPOSITION**

APPELLANT'S SUPPLEMENTAL BRIEF

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Dear Sir:

On April 14, 2003 the Appellant appealed to the Board of Appeals the decision of the Examiner dated January 9, 2003, finally rejecting Claims 11 –15, 17 – 20, and 22 – 31 of the present application. On Monday, June 16, 2003, a Brief was filed in support of that Appeal. On September 11, 2003, the Examiner mailed a withdrawal of the finality of all of the rejection. Submitted herewith is a request under 37 CFR § 1.193(b)(2)(ii) to reinstate the present Appeal. This Supplemental Brief is submitted in support of that request. This Brief is being filed in triplicate.

NEW ISSUES

In withdrawing the finality of the prior Office Action, the Examiner appears to raise only one new issue. Specifically, the Examiner introduces a series of rejections based on the judicially created doctrine of obviousness type double patenting over the patents owned by the Real Party in Interest, The Procter & Gamble Co., and cited by the Examiner in support of the §§ 102 and 103 rejections made in the Final Office Action. These obviousness type double patenting rejections are all based on the Examiner's insistence that the present claims are related only to beverage products and that the "kit" and "method" aspects of the present claims must be ignored for purposes of patentability. Thus, the Appellant believes that these rejections are simply extensions of the Examiner's previous rejections of the claims based on the general presumption that kit claims are not patentable *per se*. As such, these rejections raise no new issues.

More specifically, In the Appeal Brief, Appellant has argued that kit claims are patentable as a matter of law, and that the present kit claims are further patentable in light of the art cited by

the Examiner. Those arguments are incorporated herein by reference in their entirety. If the Board agrees with the Appellant, that the present claims are patentable as a matter of law, and are novel and non-obvious over the cited art, then the additional rejections based on the judicially created doctrine of obviousness type double patenting over the same patents cannot be sustained. As such, Appellant relies on the arguments made in the Appeal Brief, which, again, are incorporated herein in their entirety.

It is noted, however, that pages 4-7 and 12-20 of the most recent Office Action comprise a new discussion of various topics including, but not limited to: the patentability of Kit claims; the definition of a Kit; and two internal PTO Memos from the Deputy Commissioner for Patent Examination Policy. Unfortunately, after reading this additional material numerous times, the Appellant is unable to find any rejection of the present claims therewithin. Clearly, it is not the Appellant's responsibility in the patent examination process to divine rejections from the Examiner's discussion of alleged law and policy. The Appellant will gladly address any cogent rejection received from the US Patent office, but declines to conjure up rejections where none are asserted. Hence, no new issues are raised by the Examiner's added discussion.

Having said that, the Appellant would like to address the Examiner's comment regarding the definition of the word "kit". The Examiner and the memo from the Deputy Commissioner both state that the interpretation of claim terms should be "reasonable", see pages 14-15 of the Office Action. But then the Examiner makes the unreasonable and absurd assertion that the present claims are directed to kittens and other small fur bearing animals. To the extent that it is necessary, the Appellant is willing to accept as the definition of "Kit" the first dictionary definition proposed by the Examiner (that is, "Kit: a collection of articles; or the container containing these, or this with its contents", see page 13 of the Office Action). This is a "reasonable" definition in light of the present specification, see for example, *Intellectual Property Development, Inc. v. UA-Columbia Cabelvision, Inc.*, 336 F.3<sup>rd</sup> 1308, (Fed.Cir. 2003). The Examiner's assertion that the present claims are directed to kittens and other small fur bearing animals strays so far from any "reasonable" interpretation of the word "kit" that this alleged issue will not be discussed further (except to point out, again, that these comments were made *gratis* without reference to any rejection of the claims.)

#### REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company, assignee of Appellant's entire right, title, and interest in the invention at issue. The Assignment to the Procter & Gamble Company for this case is recorded at the Patent and Trademark Office at Reel 013571 and Frame 0346.

#### RELATED APPEALS AND INTERFERENCES

Appellant, Appellant's undersigned legal representative and the Assignee are not aware of any pending appeals or interferences that would be directly affected by or have a bearing on the Board's decision in the subject Appeal.

#### STATUS OF CLAIMS

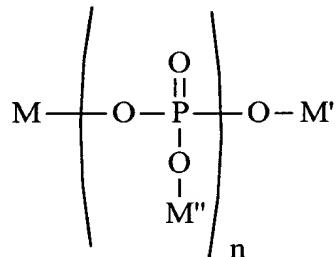
Claims 11 –15, 17 – 20, and 22 - 31 are the subject of this appeal. No other claims are pending or allowed. Claims 1-10, 16 and 21 were cancelled during prosecution. Claims 11 – 15, 17 – 20 and 22 - 31 were finally rejected in the Final Office Action dated January 9, 2003. The claims on appeal are set forth in the Appendix.

#### STATUS OF AMENDMENTS

No amendments were filed or proposed after the Final Office Action in this case. And it is believed that all previous amendments have been entered and considered.

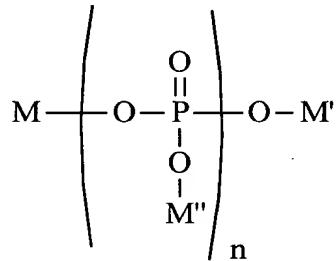
#### SUMMARY OF THE INVENTION

The present invention is related to a kit comprising a beverage composition and information that use of the beverage composition provides treatment against dental erosion. The beverage composition has a pH of less than about 5 and it comprises a compound having the structure:



In the formula above, n is an integer averaging from about 7 to about 100 and M, M', and M" are each, independently, selected from the group consisting of sodium and potassium. Further, the beverage composition is substantially free of calcium and fluoride and comprises less than about 0.025% of orthophosphate, by weight of the composition. [see, *Claim 11*]

In another aspect of the present invention there is a method of treating dental erosion comprising orally administering to a mammal a beverage composition that has a pH of less than about 5 and is substantially free of calcium and fluoride. Further the beverage composition comprises a compound having the structure:



In this structure  $n$  is an integer averaging from about 7 to about 100 and  $M$ ,  $M'$ , and  $M''$  are each, independently, selected from the group consisting of sodium and potassium. [see, *Claim 23*]

## PREVIOUS ISSUES

As a matter of law, are “kit” claims patentable?

Are Claims 11 –15, 17 – 20, and 22 – 31 novel over 11 different US Patents, under 35 U.S.C. § 102 (a), (b), or (e)?

Are Claims 11 –15, 17 – 20, and 22 - 31 obvious over US Patents to Calderas and Smith et al., in combination with Shibata et al., McGaughey, or Harris, further in light of Muhler and McDonald, under 35 U.S.C. § 103 (a)?

## GROUPING OF CLAIMS

Claims 11-15, and 17-20 and 22, which are directed to kits comprising a composition and information about the composition, stand or fall together. Claims 23-31, which are directed to methods of using a composition, stand or fall together.

## PREVIOUS ARGUMENTS

#### A. The Examiner's Previous Rejections

The Examiner has rejected Claims 11 –15, 17 – 20, and 22 – 31 as allegedly lacking novelty over 11 different US Patents, under 35 U.S.C. § 102 (a), (b), or (e). And the Examiner has further rejected Claims 11 –15, 17 – 20, and 22 - 31 as allegedly obvious under 35 U.S.C. § 103 (a) over the combination of 1) US Patents to Calderas and Smith et al., 2) in combination with Shibata et al., McGaughey, or Harris, and 3) further in light of Muhler and McDonald. Much of the Final Office Action, however, deals with the Examiner’s stated premise that “printed matter” should be given no patentable weight. As such, the Examiner asserts, “Kit” claims containing such printed matter, are *per se*, unpatentable.

In the present Office Action, the Examiner maintains all of these rejections while adding 8 additional patents to the references cited. The eight new references (US Patents: Chang, 5,336,510; Pflaumer et al., 5,641,532; Kanayake et al., 6,056,984; Calderas et al., 6,261,619;

Smith et al., 6,265,008; Calderas et al., 6,268,003; Calderas et al., 6,294,214; and Kearney et al., 6,326,040), like the 11 patents cited previously, teach beverage formulations. The present kits and methods are not taught or suggested in these references, nor does the Examiner suggest that these references contain such teachings. The Examiner continues to ignore the claim language and examine the present claims as if they did not contain the limitations to kits and methods. Thus, the additional art cited by the Examiner has no real bearing on this appeal because it is cumulative of the original art citations and admittedly does not teach the kits and methods of the present claims. All arguments made against the rejections under 35 USC §§ 102 and 103 in the Appeal Brief, filed June 16, 2003, are incorporated herein in their entirety by reference.

CONCLUSION

It is respectfully submitted that the Examiner's rejection of Claims 11 –15, 17 – 20, and 22 – 31 under 35 U.S.C. §§ 102 (a), (b) and (e) and 103(a), in view of numerous prior art references is improper. Moreover, the new rejections based on the judicially created doctrine of obviousness type double patenting over the patents owned by the Real Party in Interest, The Procter & Gamble Co., is improper. For all of the foregoing reasons, it is respectfully asserted that the information and method steps of the present claims must be given patentable weight, and that when these limitations are considered, the claims are indeed patentable over the prior art. Reversal of these rejections is therefore respectfully requested.

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Respectfully submitted,  
For: GARY (NMN) STEPHENSON

By \_\_\_\_\_

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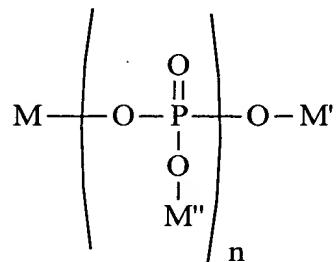
Date: October 29, 2003

**Customer No. 27752**

APPENDIX

11. A kit comprising:

(a) a beverage composition having a pH of less than about 5; wherein the beverage composition comprises a compound having the structure:



wherein n is an integer averaging from about 7 to about 100 and M, M', and M'' are each, independently, selected from the group consisting of sodium and potassium, and wherein the beverage composition is substantially free of calcium and fluoride and comprises less than about 0.025% of orthophosphate, by weight of the composition; and

(b) information that use of the beverage composition provides treatment against dental erosion.

12. A kit according to Claim 22 wherein the beverage composition has a pH from about 2 to about 4.5.

13. A kit according to Claim 12 wherein the beverage composition further comprises a sweetener.

14. A kit according to Claim 13 wherein M, M', and M'' are each sodium.

15. A kit according to Claim 14 wherein n is an integer averaging from about 10 to about 30.

17. A kit according to Claim 15 wherein n is an integer averaging from about 13 to about 25.

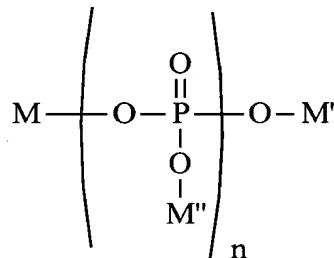
18. A kit according to Claim 17 wherein the beverage composition has a pH from about 2.7 to about 3.5.

19. A kit according to Claim 18 wherein the beverage composition comprises from about 0.1% to about 20% of the sweetener, by weight of the composition.

20. A kit according to Claim 19 wherein n is an integer averaging about 19 to about 25.

22. A kit according to Claim 11 wherein the beverage composition comprises from about 0.001% to about 0.5% of the compound, by weight of the composition.

23. A method of treating dental erosion comprising orally administering to a mammal a beverage composition having a pH of less than about 5;  
wherein the beverage composition comprises a compound having the structure:



wherein n is an integer averaging from about 7 to about 100 and M, M', and M'' are each, independently, selected from the group consisting of sodium and potassium, and wherein the beverage composition is substantially free of calcium and fluoride.

24. A method according to Claim 23 wherein the beverage composition has a pH from about 2 to about 4.5.

25. A method according to Claim 24 wherein the beverage composition further comprises a sweetener.

26. A method according to Claim 25 wherein M, M', and M'' are each sodium.

27. A method according to Claim 26 wherein n is an integer averaging from about 10 to about 30.

28. A method according to Claim 27 wherein the beverage composition has a pH from about 2.7 to about 3.5.

29. A method according to Claim 28 wherein n is an integer averaging from about 13 to about 25.

30. A method according to Claim 29 wherein the beverage composition comprises from about 0.1% to about 20% of the sweetener, by weight of the composition.

31. A method according to Claim 30 wherein n is an integer averaging from about 19 to about 25.